AGENDA
PAYETTE CITY COUNCIL
March 14, 2011
WORK SESSION & SPECIAL MEETING

HONORABLE MAYOR JEFFREY T. WILLIAMS PRESIDING

GEORGIA HANIGAN	MARK HELEKER
LEE NELSON	IVAN MUSSELL
KATHY DODSON	LES COCHRAN

5:15 PM – Work Session ~

1. ROLL CALL

2. OLD BUSINESS

3. NEW BUSINESS

   A. Oil & Gas Drilling in Payette County.....1
   B. Aviation Fuel at the Airport
   C. Sign in Bancroft Park
      ~Meals on Wheels
   D. Discussion on Bancroft Park

4. GENERAL DISCUSSION

5. MAYOR'S INFORMATIONAL POINTS TO COUNCIL

6. ADJOURN

Special Meeting immediately following work session

1. ROLL CALL

2. EXECUTIVE SESSION ~ *Pursuant to I.C. 67-2345(1c), the City Council will recess into Executive Session to Conduct Deliberations Concerning Labor Negotiations or to Acquire an Interest in Real Property Which is not Owned by the Public Agency*

3. ADJOURN

The public is invited and encouraged to attend. Special accommodations will be made in order to participate in the above noticed meeting by contacting the City 5 days prior to the meeting at 642-6024

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 11-1

To: Anne-Marie Kelso
Office of the Prosecuting Attorney
1130 Third Avenue North, # 105
Payette, ID 83661

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Whether the Oil and Gas Conservation Act, Idaho Code title 47, chapter 3, preempts local land use planning authority to authorize and regulate oil and gas well locations and conditions.

2. If the Oil and Gas Conservation Act does not preempt local land use ordinances completely, what matters remain subject to county planning and zoning authority?

3. What right does a county have with regard to the protection of ground water when regulating oil and gas exploration?

LEGAL STANDARDS

1. Local Land Use Planning Act

"With the enactment of [the Local Land Use Planning Act] in 1975, the legislature intended to give local governing boards broad powers in the area of planning and zoning." White v. Bannock County Comm'rs, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003). The stated purpose of the Local Land Use Planning Act, title 67, chapter 65, Idaho Code, ("LLUPA") is to "promote the health, safety, and general welfare of the people of the state of Idaho" by, *inter alia*, "ensur[ing] that the important environmental features of the state and localities are protected," "protect[ing] of prime agricultural, forestry, and mining lands for production of food, fibre, and minerals," ensuring "that the development on land is commensurate with the physical characteristics of the land," protecting "fish, wildlife, and recreation resources," and "avoid[ing] undue water and air pollution." Idaho Code § 67-6502.

The LLUPA requires local governments to "conduct a comprehensive planning process" that, among other things, analyzes "the intrinsic suitability of lands for uses such as agriculture, forestry, mineral exploration and extraction." Idaho Code § 67-6508. In adopting comprehensive plans, local governments are required to "consider the effect the . . . comprehensive plan would have on the source, quantity and quality of ground water in the area." Idaho Code § 67-6537(4). Zoning ordinances may "establish standards to regulate and restrict the height, number of stories, size, construction,

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reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures." Idaho Code § 67-6511. Local governments may grant special use permits that attach conditions to particular developments as necessary to address the social, economic, fiscal and environmental effects of the proposed special use. Idaho Code § 67-6512.

Local governments may adopt ordinances imposing standards for public and private developments that address such things as building design, spacing, public access, landscaping, water systems, sewage systems, and drainage systems. Idaho Code § 67-6518. When local ordinances "impose higher standards than are required by any other statute or local ordinance, the provisions of [the local] ordinances . . . shall govern." *Id.* State agencies are directed to "comply with all plans and ordinances adopted under this chapter unless otherwise provided by law." Idaho Code § 67-6528.

2. Oil and Gas Conservation Act

The Idaho Oil and Gas Conservation Act (hereinafter "OGCA") was enacted in 1963 "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the state of Idaho in such a manner as will prevent waste; to . . . provide for the . . . greater ultimate recovery of oil and gas [and encourage] the greatest possible economic recovery of oil and gas . . . ." Idaho Code § 47-315. The OGCA designates the state board of land commissioners to act as the "oil and gas conservation commission" (hereinafter "Commission") and vests the Commission with the authority to regulate:

> (1) the drilling and plugging of wells and all other operations for the production of oil or gas;
> (2) the shooting and treatment of wells;
> (3) the spacing or locating of wells;
> (4) operations to increase ultimate recovery, such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into a producing formation; and
> (5) the disposal of salt water and oil-field wastes. To classify and reclassify pools as oil, gas, or condensate pools, or wells as oil, gas, or condensate wells. To make and enforce rules, regulations, and orders reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act.

Idaho Code § 47-319. The overarching responsibility of the Commission is to prevent waste, Idaho Code § 47-316, a term defined to mean, in part, "the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced" from a given gas field. Idaho Code § 47-318(c).

The OGCA describes the Commission's authority as follows:

> The commission shall have and is hereby given jurisdiction and authority over all persons and property, public and private, necessary to enforce the provisions of this act, and shall have power and authority to make and enforce rules, regulations and orders, and do whatever may reasonably be necessary to carry out the provisions of this act. Any delegation of authority to any other state officer, board or commission to administer any and all other laws of this state relating to the conservation of oil and gas, or either of them is hereby rescinded and withdrawn and such authority is hereby unqualifiedly conferred upon the commission, as herein provided.

Section 47-317(b). The Statement of Purpose for the OGCA states that it was modified from a model act of the Interstate Oil Compact Commission, with four objects in mind: (1) ensure the preservation of information obtained from exploratory drilling, (2) prevent the waste of oil and gas, (3) prevent pollution of fresh water supplies, and (4) protect correlative rights in oil and gas pools. Statement of Purpose, House Bill 168 (Idaho Leg. 1963).

3. Preemption

The Idaho Constitution, art. XII, sec. 2, provides that a county "may make and enforce, within its limits, all such local police, sanitary and other regulations," but also provides that county regulations are preempted if "in conflict with . . . the general laws." Explicit conflict, and hence preemption, exists where the county "expressly allow[s] what the state disallows, and vice versa." Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). Conflict, and hence preemption, is implied "[w]here it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities]." *Id.*, quoting Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Preemption is also implied "where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated." *Id.*

4. Statutory Construction

In construing a statute, Idaho courts attempt "to discern and implement the intent of the legislature." Leliefeld v. Johnson, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983). "Legislative intent can be ascertained by applying rules of grammatical construction or by a plain-language interpretation of the statute." State v. Rhode, 133 Idaho 459, 463, 988 P.2d 685, 689 (1999). If the language of the statute is ambiguous, "courts variously seek edification from the statute's legislative history, examine the statute's evolution through a number of amendments, and perhaps seek enlightenment in the decisions of sister courts which have resolved the same or similar issues." Leliefeld, 104 Idaho at 367, 659 P.2d at 121. If decisions of sister courts construe a statute later adopted by the Idaho Legislature, it is assumed that the Legislature was aware of, and intended to adopt, such construction. *Id.* at 369, 659 P.2d at 123. If such construction occurs later in time it is appropriate to turn to such construction by sister states as persuasive authority. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada County, 123 Idaho 410, 418, 849 P.2d 83, 91 (1993).

ANALYSIS

I.

THE EXPRESS PREEMPTION PROVISION IN THE OGCA DOES NOT APPLY TO LOCAL GOVERNMENTS

The plain language of the OGCA rescinds and withdraws "[a]ny delegation of authority to any other ***state officer, board or commission*** to administer any and all other laws of this state relating to the conservation of oil and gas." Idaho Code § 47-317(b) (emphasis added). While it is clear that the Legislature intended to grant to the Commission the power to administer all laws related to conservation of oil and gas to the exclusion of all other state officers, boards and commissions, it is less clear whether the Legislature intended to preempt the authority of local governments to regulate oil and gas wells. In such circumstances principles of statutory interpretation must be applied to "identify the domain expressly pre-empted by that language." Walker v. American Cyanamid Co., 130 Idaho 824, 828, 948 P.2d 1123, 1127 (1997) (internal quotation omitted) (discussing federal preemption).

The terms "state officer, board or commission" are not defined in the OGCA, but such terms, used elsewhere in the Idaho Code, are used to refer solely to elected and appointed officials of the State of Idaho. *See, e.g.,* Idaho Code § 34-1701 (setting forth three categories of public officers subject to recall: "state officers," "county officers," and "city officers"); § 59-831 (distinguishing state officers from county officers for bonding purposes). Such examples imply that the term "state officer, board or commission" would not be understood by the legislature to include county officers or boards of county commissioners.

This is confirmed by other examples of explicit preemption in the Idaho Code that specifically identify counties among the preempted entities. *See, e.g.,* Idaho Code § 18-3302J (stating "no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation" regulating firearms and providing exceptions); § 18-4113 ("it is the intent of the legislature to preempt, to the exclusion of city and county governments, the regulation of the sale, loan, distribution, dissemination, presentation, or exhibition of material or live conduct which is obscene"); § 37-3305 ("[t]he provisions of this chapter shall be construed to preempt more stringent regulation of retail sales of pseudoephedrine products by any county, city or other political subdivision"); § 55-2605 ("[l]ocal governmental law is herein preempted and local governments shall not have authority to establish or enforce noise standards for outdoor sport shooting ranges"); § 61-1703 (under specific conditions, public utilities commission "is vested with the authority to preempt local government land use decisions pertaining to the construction of transmission facilities in national interest electric transmission corridors").

In short, while the plain language of the OGCA explicitly precludes state entities other than the Commission from regulating oil and gas wells, there is nothing to indicate that the legislature intended to preempt counties from regulating oil and gas wells. This interpretation can neither be confirmed or denied by the OGCA's legislative history, which contains no discussion of the preemption provision. Likewise, the evolution of the statute through the amendment process is unrevealing, since the relevant preemption language has not been amended since its initial enactment in 1963.

The Colorado Supreme Court, in interpreting a nearly identical preemption provision in the Colorado Oil and Gas Conservation Act, concluded that the plain language of the statute did not preempt local authority.[1] In Bd. of County Comm'rs v. Bowen/Edwards Assoc's, 830 P.2d 1045 (Colo. 1992) (hereinafter "Bowen/Edwards"), the Court began its preemption analysis by examining the plain language of the preemption provision. The Court held that the preemption provision did not preempt county regulations since the rescission and withdrawal of authority to regulate oil and gas wells applied only to state officers and did "not include within its express terms *local* or *county* officers, boards, or commissions." *Id.* at 1057. Thus, the Court concluded that the statute was "merely an effort to clarify that the only *state* administrative body with regulatory authority over oil and gas activities is the Oil and Gas Conservation Commission." *Id.*

In reaching its conclusion, the Court also examined the purposes of the Colorado Oil and Gas Conservation Act, which are similar in substance to those of the OGCA, namely prevent waste, safeguard correlative rights, and promote the development, production and utilization of oil and gas. Compare

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[1] Colorado Rev. Stat. § 34-60-105(1) provides, in part:

The commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article. Any delegation of authority to any other state officer, board, or commission to administer any other laws of this state relating to the conservation of oil or gas, or either of them, is hereby rescinded and withdrawn and such authority is unqualifiedly conferred upon the commission, as provided in this section.

Colo. Rev. Stat. 34-60-102(1) and Idaho Code § 47-315. After examining the preemption provision, the Court examined the powers vested in the Colorado oil and gas conservation commission, which included the power to "regulate the drilling, production, and plugging of wells, the shooting and chemical treatment of wells, the spacing of wells, and the disposal of salt water and oil field wastes." 830 P.2d at 1049 (citing Colo. Rev. Stat. § 34-60-106(2)); *cf.* Idaho Code § 47-319 (similar provisions). The Court also examined the "extensive list of technical requirements" that the commission was authorized to enforce "relating to developmental and operational aspects of oil and gas production." 830 P.2d at 1049. The Court concluded that neither the purposes of the Colorado Oil and Gas Conservation Act nor the scope of authorities vested in the commission compelled an interpretation at odds with the plain language of the preemption provision.

The rationale of the Colorado Supreme Court is consistent with the plain terms of Idaho Code § 47-317(b), and is consistent with the historical practice of the Idaho legislature in explicitly naming local governments when expressing an intent to preempt local regulations. Given those facts, Idaho Code § 47-317(b) is likely to be interpreted as only precluding regulation of oil and gas wells by other state officers, boards, commissions and agencies, leaving intact county land use ordinances affecting the location, construction, and operation of oil and gas wells.

II.

THE OGCA DOES NOT "OCCUPY THE FIELD" OF OIL AND GAS REGULATION TO THE EXTENT THAT PREEMPTION OF ALL LOCAL LAND USE PLANNING ORDINANCES IS IMPLIED

When explicit language preempting local regulation is not present, preemption may still be implied if "the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation." Envirosafe Serv. of Idaho, 112 Idaho at 689, 735 P.2d at 1000. Regulations are "pervasive" if they set forth a "comprehensive statutory scheme" or act in "an all-encompassing fashion." *Id.* at 690, 735 P.2d at 1001.

While the OGCA vests the Commission with broad authority to foster development of oil and gas resources and prevent waste, the areas to be regulated by the Commission are limited to technical aspects of well drilling and operation, such as the drilling, plugging, shooting, and spacing of wells, operations to increase recovery, including the introduction of gas, water, or other substances into a producing formation, and the disposal of salt water and oil field wastes. Idaho Code § 47-319. The Commission is "authorized and it is its duty to prevent waste of oil and gas and to protect correlative rights, and otherwise to administer and enforce this act . . . [it] has jurisdiction over all persons and property necessary ***for that purpose***." Idaho Code § 47-319(b) (emphasis added). The Commission's general authority to prevent waste and protect correlative rights is accompanied by a laundry list of specific authorities that grants the Commission the power to regulate the sampling, drilling, metering and testing of wells. Idaho Code § 47-319(d). Rules promulgated by the Commission must be "reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act." Idaho Code § 47-319.

Noticeably missing from the Commission's grant of authority is a general power to regulate oil and gas production to protect public health and welfare.[2] The absence of such authority, and the laundry list of technical aspects of oil and gas production to be regulated by the Commission, compels the

[2] *Cf.* Colo. Rev. Stat. § 34-60-106(2)(d) (Colorado oil and gas commission to regulate "[o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility").

conclusion that the legislature did not intend to so completely occupy the field of oil and gas production as to exclude any application of local ordinances.

Courts from other states reviewing similar grants of authority to oil and gas commissions have likewise concluded that the application of local zoning ordinances to oil and gas wells is not completely excluded. In Bowen/Edwards, the Colorado Supreme Court concluded that the "enactment of a state statute addressing certain aspects" of oil and gas development and production did not indicate legislative intent to occupy the field and exclude county land use ordinances. 830 P.2d at 1058. While the state statutes "require[d] uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions . . . environmental restoration [and] the location and spacing of wells," they were not, in the court's view, "so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." *Id.*

Courts from other jurisdictions have noted that while zoning controls are "narrower" than oil and gas regulations "because they ordinarily do not relate to matters of statewide concern," they are also "broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development [and] includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces." Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 865 (Pa. 2009). The breadth of regulation under the LLUPA is similarly broad. White, 139 Idaho at 400, 80 P.3d at 336. Given that the potential breadth of zoning regulations that may apply to oil and gas developments under the LLUPA exceeds the zone of subjects governed by the OGCA, a finding of legislative intent to occupy the field of regulation is unlikely.

III.

THE NEED FOR UNIFORM REGULATION OF OIL AND GAS DEVELOPMENT AND OPERATIONS DOES NOT EXCLUDE APPLICATION OF LOCAL LAND USE PLANNING ORDINANCES

Preemption may also be implied where "uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated" or is "fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach." Envirosafe Serv. of Idaho, 112 Idaho at 691, 735 P.2d at 1002. The need for uniform regulation is more likely to be implied in the event of "unique importance and complexity of the subject matter." *Id.*

A review of statutes and court decisions from other jurisdictions reveals a common understanding that while there is a need for unitary regulation of the technical aspects of oil and gas production at the state level in order to prevent waste and protect correlative rights, there is no similar need for unified regulation of other aspects of oil and gas production, thus providing a window for application of local zoning ordinances that do not interfere with state objectives.

In Bowen/Edwards, the Colorado Supreme Court concluded that while a "unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers," the intent to consolidate state regulatory authority did not "expressly preempt any and all aspects of a county's land-use authority over those areas of a county in which oil and gas activities are

occurring or are planned." 830 P.2d at 1058. The Court went on to explain the fundamental difference between the unitary state regulations and local land use ordinances:

> While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county's interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.

Id. at 1057.

In Penneco Oil Co. v. County of Fayette, 4 A.3d 722 (Pa. 2010), the Pennsylvania Supreme Court found that zoning ordinances and oil and gas regulations can coexist because the traditional purposes of zoning are distinct from the purposes of oil and gas regulatory provisions. *Id.* at 727. So long as the zoning ordinance does not "regulate oil and gas wells in the same manner as the [statewide oil and gas act]," or attempt to "enact a comprehensive scheme relative to the oil and gas development within the county but instead reflect traditional zoning regulations that identify which uses are permitted in different areas of the locality," preemption is not implied. *Id.* at 732-33.

It is also notable that the 2004 Model Oil and Gas Conservation Act drafted by the Interstate Oil and Gas Compact Commission includes the following model provision regarding the scope of an oil and gas commission's authority:

> SECTION 4. GENERAL AUTHORITY OF THE [COMMISSION].
> The [commission] shall have exclusive authority [, subject only to any applicable local zoning and land-use regulations]:
> (a) to regulate an oil and gas operation;
> (b) to prevent the waste of oil, gas, or by-products;
> (c) to protect correlative rights . . . .

Model Oil and Gas Conservation Act, Interstate Oil and Gas Compact Comm'n (2004) (http://www.iogcc.state.ok.us/Websites/iogcc/docs/ModelAct-Dec2004.pdf) (bracketed material in original). The model act's recognition that states may opt to explicitly defer to local zoning ordinances confirm that state objectives for oil and gas production can be fulfilled without preempting local zoning and land use regulations. Such reasoning is applicable to the OGCA, even though the OGCA was based on an earlier version of the model act, since the subjects regulated in the model act and the OGCA are similar. Indeed, if anything, the subjects regulated in the OGCA are narrower in scope than the subjects regulated by the 2004 model act, leaving a broader area of subjects open for local regulation.

The cited authorities all support the proposition that the need for unitary regulation of the technical aspects of oil and gas development and production does not require preemption of local zoning and land use regulations addressing objectives that are not in conflict with the purposes and objectives of the OGCA.

IV.

EVEN THOUGH NOT PREEMPTED GENERALLY, A LOCAL LAND USE ORDINANCE IS PREEMPTED IF AN ACTUAL OR OPERATIONAL CONFLICT EXISTS BETWEEN THE ORDINANCE AND THE OGCA

You asked if the OGCA is not a complete preemption, what matters remain subject to county planning and zoning authority? You also asked what authority does a county possess with regard to the protection of ground water when regulating oil and gas exploration?

As a general matter, local ordinances cannot permit what a state statute or regulation forbids or prohibit what state enactments allow. Envirosafe Serv. of Idaho, 112 Idaho at 689, 735 P.2d at 1000. For example, in Town of Frederick v. North American Res. Co., 60 P.3d 758 (Colo. Ct. App. 2002), the Colorado Court of Appeals struck down portions of a city ordinance purporting to impose setback and noise abatement requirements on oil and gas operations, since the city's requirements exceeded setback and noise abatement requirements in state oil and gas regulations. *Id.* at 765.

Actual conflict may also exist where a local ordinance obstructs the execution of the full purposes and objectives of the legislature. *See* Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941) (state statute preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). For example, the Colorado Supreme Court, on the same day it held that local land use planning was not preempted generally in Bowen/Edwards, issued a companion decision addressing a city ordinance forbidding any oil or gas wells within city limits. The Court held that allowing the city to prohibit all oil and gas development in a specified area would conflict operationally with state statutes vesting decisions about location and spacing with the state oil and gas commission and would thwart the state objective of avoiding waste and protecting correlative rights:

> [I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact the correlative rights of the owners of oil and gas interests in a common source or pool by exaggerating production in one area and depressing it an another.

Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1067 (Colo. 1992). The Court cautioned that preemption of the city's total ban on drilling did not mean all local ordinances would be preempted, since many local ordinances "do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals" of state oil and gas legislation. *Id.* at 1069. This principle is embodied in the LLUPA, which provides that local governments may set standards for such things as building design, open spaces, parking spaces, water systems, sewer systems, etc., and that such standards shall govern if "higher" than standards imposed by statute. Idaho Code § 67-6518. Local standards may include provisions to "avoid undue water and air pollution," Idaho Code § 67-6502(k). While "[c]ounty ordinances cannot conflict with state statutes and are void to the extent that they do . . . [c]ounty ordinances can . . . complement or supplement state statutes regulating water quality to the extent they are not in conflict." Idaho Dairymen's Ass'n v. Gooding County, 148 Idaho 653, 660, 227 P.3d 907, 914 (2010). Thus, local governments can impose standards upon oil and gas developments of the type described in Idaho Code § 67-6518, including standards to protect ground water, if such standards do not create operational conflicts with OGCA provisions, rules, or orders of the Commission, or otherwise frustrate the stated goals and purposes of the OGCA.

It would be premature, however, to apply the above guidelines to further define the matters that the county may regulate without conflicting with the OGCA or regulations promulgated by the Commission. In most instances determining preemption requires a searching factual inquiry, as addressed by the Colorado Supreme Court in Bowen/Edwards:

> [T]here may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest. Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record.

830 P.2d at 1060; *see also* Town of Frederick, 60 P.3d at 764 (affirming trial court's fact-based determination that town's special use permit and building permit requirements for oil and gas wells did not create an "operational conflict" in the absence of corresponding state rules); Bd. of County Comm'rs v. BDS Int'l, 159 P.3d 773 (Colo. Ct. App. 2006) (evidentiary hearing needed to determine whether operational conflicts existed between oil and gas commission rules and county regulations imposing conditions on oil and gas developments pertaining to water quality, soil erosion, wildlife, vegetation, livestock, cultural and historic resources, geologic hazards, wildfire protection and recreation impacts).

Here, with no factual record, it is not practical to determine what aspects of pending gas development projects may be regulated by Payette County. A response to your questions would require a detailed inquiry into the nature, purpose and objective of the particular zoning ordinance, and a determination of its operational effects on oil and gas development.

CONCLUSION

Because the OGCA does not express, either explicitly or impliedly, an intent to preempt the operation of local land use planning authorities, such authorities may be applied to oil and gas developments if done in a manner consistent with the goals, objectives, and authorities of the Local Land Use Planning Act and in the absence of operational conflicts between the zoning ordinance and the OGCA or Commission rules or orders.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. XII, § 2.

2. Idaho Code:

§ 18-3302J.
§ 18-4113.
§ 34-1701.
§ 37-3305.
§ 47-315.

§ 47-316.
§ 47-317(b).
§ 47-318(c).
§ 47-319.
§ 47-319(b).
§ 47-319(d).
§ 55-2605.
§ 59-831.
§ 61-1703.
Title 67, chapter 65
§ 67-6502.
§ 67-6502(k).
§ 67-6508.
§ 67-6511.
§ 67-6512.
§ 67-6518.
§ 67-6528.
§ 67-6537(4).
Local Land Use Planning Act, Idaho Code title 67, chapter 65.
Oil and Gas Conservation Act, Idaho Code title 47, chapter 3.

3. **U.S. Supreme Ct. Cases:**

Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

4. **Idaho Cases:**

Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada County, 123 Idaho 410, 849 P.2d 83 (1993).

Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

Idaho Dairymen's Ass'n v. Gooding County, 148 Idaho 653, 227 P.3d 907 (2010).

Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

State v. Rhode, 133 Idaho 459, 988 P.2d 685 (1999).

Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997).

White v. Bannock County Comm'rs, 139 Idaho 396, 80 P.3d 332 (2003).

5. **Other Cases:**

Bd. of County Comm'rs v. BDS Int'l, 159 P.3d 773 (Colo. Ct. App. 2006).

Bd. of County Comm'rs v. Bowen/Edwards Assoc's, 830 P.2d 1045 (Colo. 1992).

Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855 (Pa. 2009).

Penneco Oil Co. v. County of Fayette, 4 A.3d 722 (Pa. 2010).

Town of Frederick v. North American Res. Co., 60 P.3d 758 (Colo. Ct. App. 2002).

Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992).

6. Other Authorities:

Colorado Oil and Gas Conservation Act, Colo. Rev. Stat. 34-60-100 *et seq.*
Colo. Rev. Stat. 34-60-102(1).
Colo. Rev. Stat. 34-60-105(1).
Colo. Rev. Stat. 34-60-106(2).
Colo. Rev. Stat. 34-60-106(2)(d).
Model Oil and Gas Conservation Act, Interstate Oil and Gas Compact Comm'n (2004).
Statement of Purpose, House Bill 168 (Idaho Leg. 1963).

DATED this 21st day of January, 2011.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

STEVEN STRACK
Deputy Attorney General

Idaho Department of Lands
March 1, 2011 1-3 pm

Purpose: to identify the concerns of the city and county regarding the hydraulic fracturing proposed by Bridge Resources Corp. and to determine how those concerns may be addressed in the draft temporary rule.

Attendees:

Eric Wilson, IDL
Jodie West, Bridge resources Corp.
Tim Giles, Holladay Engineering
Andy Gherke, Holladay Engineering
Beau Ziemer, City of New Plymouth
Mayor Joe Cook, City of New Plymouth
George Bacon, IDL
Rudy Endrikat, Payette County
Mike Murphy, IDL
Steven Schuster, Attorney General's Office
Anne Marie Kelso, Payette County Prosecutor's Office
Frazer Peterson, Payette County P&Z
W. Kirk Williams, Baird Hanson Williams LLP
Kim Parsons, Bridge Resources Corp.
Steve West, Centra Consulting
Helen Price, IDL

Hydraulic Fracturing
Issues Discussed

1. *Several questions regarding IDL Enforcement. In general, how will IDL ensure that activities are done as per the approved permits and in conformance with standards?*

   IDL's Area staff performs inspections at key times in the drilling process. They have received some training from qualified consultants, and more training will be pursued for IDL staff. IDL staff cannot be expected to be on the drilling site at all times.

2. *Question regarding the assurances of the quality of the well seals.*

   A Cement Bond Log can be run after cementing, and a pressure test can be performed on the seal. The records of these tests are given to IDL.

3. *Question regarding horizontal drilling in Bridge Energy's plans.*

   Horizontal drilling is not in its plans at the present time. That could change due to unforeseen circumstances. Non-vertical wells require specific review and approval by IDL, with an opportunity for a public hearing. Horizontal wells would require an entirely new well, as the current well designs cannot accommodate that activity. Horizontal drilling is also commonly done when developing shale gas resources. The currently identified gas reservoir is a traditional sandstone reservoir. Directional drilling is often done to minimize surface disturbance, and would also fall under the non-vertical well

DRAFT

Insert Date

Mr. George B. Bacon, Director
Idaho Department of Lands
300 North 6th Street
P.O. Box 83720
Boise, ID 83720-0050

RE: Rules for the Conservation of Crude Oil and Natural Gas in Idaho
Draft Temporary Rule 20.07.02.055

Dear Mr. Bacon:

We have reviewed the Draft Temporary Rule 20.07.02.055 and have the following general comments and specific rule language comments. We would request that the Idaho Department of Lands (IDL) and the Idaho Oil and Gas Conservation Commission (OGCC) consider these comments and modify the Draft Temporary Rule 20.07.02.055 for a second round of review by the concerned parties.

General Comments:

1. We agree with IDL that a temporary rule is justified to protect the public health, safety, and welfare by safeguarding groundwater resources. We request that additional time be allowed for this process so that the resulting temporary rule does in fact meet these goals. Local governments, such as city councils, typically meet only once or twice per month, so at least one month per iteration of the draft temporary rule is needed.

2. The temporary rule should take a cautious approach since well treatments on production oil and gas wells are new to Idaho. Rules assembled quickly and/or borrowed from other states may not adequately address issues specific to the State of Idaho and the local area where well treatments are being proposed. For example, municipalities in other states may be relying on surface water rather than groundwater for drinking water sources. Thus the structure of the rules and the ability to detect or measure problems with groundwater may not provide a direct comparison for this region. As more information becomes available specific to this region, the specific rule requirements can be revisited in the final rule through the negotiated rulemaking process. In the meantime, a more conservative approach is recommended and requested. The temporary rule should prohibit practices that do not have a long-term history of being protective of groundwater resources, public health, safety, and welfare.

3. The draft temporary rule generally lacks specific language that would allow the IDL and OGCC the ability to deny approval of any application to perform well treatments. It is primarily a list of application submittal and post well treatment reporting requirements. We believe that the IDL and OGCC must have the ability to deny an application based on specific rule requirements which are designed to prevent problems, not just require reporting to the IDL and OGCC after the problem has already occurred.

4. Well treatments should be prohibited within Idaho Department of Environmental Quality (DEQ) certified drinking water well delineation zones (capture zones) in the temporary

rule. The potential risk for contamination of city drinking water supplies and the potential costs of securing alternate supplies and/or water treatment to meet state and federal drinking water regulations are significant concerns. Budget constraints of local cities and residents are also a serious concern and the costs for any necessary corrective action would likely not be feasible. Even with certain insurance provisions, costs could be significant and may not be economically feasible. Well treatments within DEQ certified drinking water well capture zones represent too great a risk to be allowed under a temporary rule.

Specific Rule Language Comments:

1. Item 055.02.f – Revise "pits" to "tanks." Prohibit the use of pits in the temporary rule.

2. Item 055.02.g – Revise to "Expected fracture length in both the horizontal and vertical directions."

3. Add Item 055.02.j – Groundwater protection report demonstrating how groundwater resources will be protected from contamination. Applications not demonstrating protection of groundwater resources shall be denied.

4. Add Item 055.02.k – Geophysical log showing all fresh water aquifer zones. Well treatments, including the expected fracture length, are prohibited within 1000 feet vertical separation from the deepest fresh water aquifer zone.

5. Add Item 055.02.l – Cement bond log demonstrating suitability and integrity of cement. Well treatments are prohibited in wells with cement deficiencies.

6. Item 055.06.a – Also require static pressure prior to and after the operation.

7. Item 055.07.b – Revise to "Prior to the well stimulation, the operator shall perform a suitable mechanical integrity test of the casing or of the casing-tubing annulus or other mechanical integrity test methods and submit an affidavit certifying that the well can withstand the anticipated pressures."

8. Item 055.07.k – Revise the second to last sentence to "Storage of such fluid shall be protective of groundwater as demonstrated by the use of tanks." Revise the last sentence to "Pits are prohibited."

9. Add Item 055.08 – Well treatments are prohibited within DEQ certified drinking water well capture zones, within a horizontal distance of 1000 feet of such capture zones, and within 3000 feet of municipal wells.

10. Add Item 055.09 – The Commission may require additional bonding and/or insurance for protection of surface and groundwater resources and other environmental resources.

11. Add Item 055.10 – The Commission may require monitoring wells. Approval by the Commission is required for number of monitoring wells, placement, spacing, depth, and design. The applicant shall submit geophysical logs showing all fresh water zones and cement bond logs for review by the Commission in determining monitoring well requirements. The applicant shall be responsible for monitoring well construction and continued maintenance. Access to monitoring wells shall be granted to the Commission and other State agencies for ongoing testing.

12. Add Item 055.11 – Periodic or full-time onsite observation of well treatment activities may be required by the Commission. This would not relieve the applicant of submitting a report on the well treatment.

We thank the Idaho Department of Lands and the Idaho Oil and Gas Conservation Commission for the opportunity to comment on the Draft Temporary Rule 20.07.02.055. Again, we would request consideration of these comments and modification of the Draft Temporary Rule 20.07.02.055 for a second round of review by the concerned parties.

Sincerely,

cc: Kim Parsons, Bridge Resources